IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

ORDER
IN
S.B. Civil Second Appeal No.164/1986

Ikram Hussain S/o Shri Ajhar Hussain
...plaintiff-appellant
Versus
Madan S/o Hussain & Another
...defendant-respondents
AND
Kadira W/o Jeewan Ali & Others
...defendant-respondents

Date of Order ::: 14th November, 2006

Present
Hon'ble Mr. Justice Narendra Kumar Jain

Shri Sagar Mal Mehta, Sr. Advocate, with
Shri D.S. Poonia, Counsel for plaintiff-appellants
Shri Bhanu Pareek, Counsel for defendant-respondents
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By the Court:-

This is plaintiffs' second appeal under Section 100 of the Code of Civil Procedure (for short, 'C.P.C.') directed against the judgment and decree dated 10th of March, 1986 passed by the Civil Judge, Jhunjhunu, in Civil Appeal No.1/86 (11/82), whereby he allowed the appeal of the defendants and set aside the judgment dated 9th of February, 1982 of the Munsif, Jhunjhunu,, whereby Suit No.40/75 of the plaintiffs for perpetual injunction as well as possession, was decreed.

This court, vide order dated 8.1.1988, admitted the second appeal and formulated the following substantial questions of law:-

> "(i) Whether the learned lower appellate court illegally considered the land of the Bhurj to be the disputed land, which finding is contrary to the pleadings of the parties and is, therefore, vitiated being perverse and based on misreading of evidence?
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> (ii) Whether the learned lower appellate court misinterpreted the gift-deed Ex.2 where it held that it relates to the land of Bhurj?
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> (iii) Whether the view of the learned lower appellate court that in Muslim Law no adoption is permissible even there is a prevailing custom in a particular area and community, is erroneous in law and point No.5 has been illegally decided by it?

Brief facts giving rise to this second appeal are that the plaintiffs filed a suit for perpetual injunction and possession in respect of the land, in dispute, wherein it was pleaded that there is plaintiffs' 'Haveli', 'Nohra', 'Baithak' and open land in front of it, situated in town Bisau, and the boundaries of which were given in Para 1 of the plaint. The open land in front of the house of the

plaintiffs was described up-to the western-town-wall and from the northern-town-wall up-to the land of Jeewan Ali in the south, and it was pleaded that the same was gifted way-back on 14.3.1922 to Peer Shahabuddin by the then Jagirdar of Bisau – Rawal Bishan Singh. Peer Shahabuddin was an employee of Thikana Bisau. He was father of plaintiff Smt. Sagira and grandfather of plaintiff no.2. The measurement of the land gifted on 14.3.1922 was also given in Para 2 of the plaint. A sketch-map of land was also annexed with the plaint. It was further pleaded in the plaint that Peer Shahabuddin died in the year 1944 and after his death the plaintiffs became the owners of the land, in question. The disputed land measuring 16' x 12' is the part of gifted land. It was further pleaded that on 25.4.1975 when plaintiff no.2 had gone to Bisau to look after his 'Haveli' then he found that the defendants no.1 and 2 were demolishing the southern wall of their house and they wanted to open a way from the aforesaid land of the plaintiffs.

The defendants no.1 and 2 filed a joint written statement wherein it was pleaded by them that the land, towards western side of the 'Baithak' of the plaintiffs, vested in the Municipal Board, Bisau, and

the disputed land measuring 16' x 12' is a part of the said land, which also vested in the Municipal Board, Bisau, and the same has been allotted to them by issuing a 'patta' by Municipal Board, Bisau, on 16.9.1970. The said 'patta' has been issued in the name of defendant Madan. It was also pleaded that the Municipal Board had given them permission for raising construction on the said piece of land on 3.10.1970, therefore, the defendants claimed their ownership over the land, in dispute, through 'patta' issued by the Municipal Board on 16.9.1970.

That, on the basis of the pleadings of the parties, the learned lower court framed nine issues, which are reproduced in the judgments of both the courts below. The plaintiffs examined 12 witnesses PW-1 to PW-12 and produced fifteen documents Exhibit-1 to Exhibit-15. The defendants examined 5 witnesses and produced seven documents.

The learned lower court, after considering the submissions as well as the oral and documentary evidence of both the parties, decreed the plaintiffs' suit. The lower court decided issue no.1 in favour of the plaintiffs and held that Rawal Bishan Singh, the then Jagirdar of Thikana Bisau, had gifted the land to Peer Shahabuddin on 14.3.1922 and the disputed piece

of land measuring 16' x 12' is the part of that gifted land and since then it was in possession of the donee and his successors. Being aggrieved with the same, the defendants no.1 and 2 filed an appeal.

The learned first appellate court, vide its impugned judgment and decree dated 10.3.1986 set aside the judgment and decree passed by the lower court and allowed the appeal of the defendants and dismissed the suit of the plaintiffs. Hence, this second appeal has been preferred on behalf of the plaintiffs.

The learned counsel for the appellants has contended that the judgment and decree passed by the first appellate court is contrary to law and facts, both. The finding of the first appellate court is absolutely illegal and the same is liable to be set aside. The learned counsel for the appellants has referred the statement of the plaintiffs' as well as defendants' witnesses in support of his contention that the finding of the first appellate court is perverse and there is a complete misreading of the evidence by the first appellate court while setting aside the finding of the lower court. He has also referred the relevant documents filed by the plaintiffs as well as defendants during the course of arguments. He, therefore, contended that the judgment

and decree passed by the first appellate court be set aside and the judgment and decree passed by the lower court be restored.

On the contrary, the learned counsel for the respondents supported the judgment of the learned first appellate court and contended that the arguments advanced on behalf of the appellants are not tenable in view of the finding of the first appellate court and the present second appeal deserves to be dismissed

I have considered the submissions of the learned counsel for both the parties and minutely scanned the impugned judgment and decree as well as the record of both the courts below.

As per the case of the plaintiffs, their 'Haveli', 'Nohra', 'Baithak' and open land in front of it, are situated in town Bisau and they have given the details of the boundaries of their 'Haveli' in Para 1 of the plaint. They have also described the open land in front of their house up-to the western town wall and from northern town wall up-to the land of Jeewan Ali up-to the south, and the same was gifted to Peer Shahabuddin by the then Jagirdar of Bisau – Rawal Bishan Singh, vide gift-deed (Exhibit-2) dated 14.3.1922.

The case of the defendants is that the land

towards the west of the plaintiffs' 'Baithak' vests in the Municipal Board Bisau and the land, in question, measuring 16' x 12' is a part of the said land and the Municipal Board, Bisau, had given the 'patta' of the disputed land measuring 16' x 12' on 16.9.1970 in the name of defendant Madan, therefore, they are the owners of the disputed piece of land measuring 16' x 12'. PW-1 Ajhar Hussain is the plaintiff himself, PW-2 Shri Vasu Dev is the ex-Chairman of the Municipal Board, Bisau, and resides in the neighborhood of the land, in question. He denied that the open land towards the western side of the plaintiffs' house vests in the Municipal Board. He has stated that the disputed land belongs to the plaintiffs. PW-3 is Peeru, who resides in the neighborhood of the land, in question, and he stated that the land belongs to the plaintiffs. PW-4 Dashrath Singh is a scribe of gift-deed (Exhibit-2), executed by the then Jagirdar of Thikana Bisau in favour of Peer Shahabuddin. PW-4 Dashrath Singh has proved the gift-deed (Exhibit-2). PW-5 Bhagirath is ex-employee of the then Thikana Bisau, who has stated that the land, in question, belongs to the plaintiffs. PW-6 Sharafat Hussain has stated that defendant Madan had asked him to have a talk with plaintiffs for purchase of the land, in

dispute. PW-7 Daud Ali has also stated that defendant Madan had a talk with the plaintiffs for purchase of the land, in dispute. PW-8 Shri Umardeen, the another neighborhood, has stated that the disputed land belongs to the plaintiffs. PW-9 Jai Narain has stated that the defendants Madan and Shafi wanted to erect stone slabs, in the month of October, 1975, over the disputed piece of land. PW-10 Ikram Hussain is the son of Mst. Sagira. He appeared as power of attorney of Mst. Sagira, plaintiff. *PW-11* Abdul Rahman has proved the custom of adoption in the community of Pirjadas and in his presence the defendant Madan had a talk with the plaintiffs for purchasing the land, in question. PW-12 Rajjaq also stated that the plaintiffs are the owners of the disputed land. Exhibit-1 is a sketch-map of the land, in question, in which the disputed land has been shown by marking 'L'. Exhibit-2 is the gift-deed dated 14.3.1922 executed by the then Jagirdar of Thikana Bisau, by which the land, in question, along with the other land were gifted to Peer Shahabuddin. Exhibit-3 is the copy of the plaint, which was filed when the defendants wanted to open the windows and ventilators of their first floor towards the south of their houses. Exhibit-5 is the copy of 'patta' issued in favour of defendant Madan by Gram

Panchayat Bisau, whereby the land was sold to defendant Madan by Gram Panchayat and the boundaries of that land have been described wherein town walls have been shown towards the south of the said land. Exhibit-5 is of the year 1960 and it shows that there was no way in the southern side as pleaded by the defendants. Exhibit-6 is the service-book of Ajhar Hussain for the service in Thikana Bisau wherein his father's name has been mentioned as Peer Shahabuddin. Exhibit-7 is the original telegram given by Rawal Bishan Singh, the then Jagirdar of Thikana Bisau. The said telegram was sent by him from Bombay to plaintiff Ajhar on 18.7.1944 in condolence of sad demise of Peer Shahabuddin and in the said telegram Ajhar Hussain has been described as adopted son of Peer Shahabuddin. Exhibit-8 is the details of papers contained in File N.62 of Samvat 2001 in respect of an inquiry. The description of the land sold by Thikana Bisau shown at item No.14 is the land of Bhurj which is outside the city wall. Exhibit-9 is the proceedings of the then Thikana Bisau on the application of one Ram Ballabh seeking permission to adopt a son. In the said proceedings there is mention about the permission granted by Thikana Bisau to Peer Shahabuddin to adopt plaintiff Ajhar Hussain, while rejecting the

permission to Ram Ballabh. This document has been placed on the record to show that Ajhar Hussain is adopted son of Peer Shahabuddin. Exhibit-10 is the copy of general power of attorney executed by Thakur Raghuveer Singh son of Rawal Bishan Singh on *26.10.1950* in favour of Ajhar Hussain wherein father's name of Ajhar Hussain has been mentioned as Peer Shahabuddin. Exhibit-10 is the registered document registered with the Sub Registrar, Jaipur City. Exhibits 11, 12, 13 and 14 have also been produced by the plaintiffs to prove that the disputed land belongs to them and the plaintiff Ajhar Hussain is son of Peer Shahabuddin. Exhibit-15 is the copy of 'patta' issued by Municipal Board, Bisau in favour of defendant Madan. This document was confronted with defendant Madan during his cross-examination. In Exhibit-15 the description of the land, given to defendant Madan, has been mentioned and towards the south and east the land of plaintiff Ajhar Hussain has been shown. This document (Exhibit-15) is contrary to Exhibit A-1, the copy of 'patta' produced by defendants. Exhibit-15 shows that there is interpolation in the document Exhibit A-1, the 'patta' produced by the defendants and due to this the document Exhibit A-1 is liable to be discarded.

Apart from plaintiffs' oral and documentary evidence, DW-1, the defendant himself, in his statement dated 20.8.1976, in the cross-examination, has admitted that towards the north side of the 'Baithak' of plaintiff Ajhar Hussain, the land belongs to plaintiffs. He has admitted that his 'Haveli' opens towards north side, whereas the disputed land is towards the south side. DW-1 could not explain the variance in between Exhibit-15 and Exhibit A-1, which are copies of the same 'patta' issued in 1970 in favour of defendant Madan by Municipal Board. DW-3 Nand Kumar also admitted that he did not see possession of Ajhar Hussain over the open land but he heard that it was belonging to Ajhar Hussain, the plaintiff. He also admitted that there was no way on the disputed place. DW-1 Madan, the defendant, in his statement dated *2.3.1981*, has admitted that the place for which the 'patta' has been given to him by the Municipal Board, is a part of Bhurj itself and the Bhurj was in existence on the same place earlier. DW-2 Ramzan has stated that a 'patta' was given to Madan and Shafi of the land belonging to Bhurj. He has also admitted that the disputed land is situated inside the city wall whereas the house of Madan and Shafi is situated outside the city wall. He has also admitted

that towards the west of 'Baithak' the land belongs to the plaintiff. He has further stated that there was no way in between the house of Madan and city wall. There was one Bhurj in between the house of Madan and city wall. The learned lower court considered the oral and documentary evidence in detail and decided issue no.1 in favour of the plaintiff. Exhibit-2, the gift-deed, is proved from the statement of the plaintiffs' witnesses and no-doubt can be made on its genuineness.

The learned first appellate court, without appreciating the evidence on the record correctly but by misreading the same, wrongly reversed the findings of the lower court in respect of issue no.1 and wrongly held that execution of Exhibit-2, gift-deed, by Rawal Bishan Singh is doubtful. The learned first appellate court has assigned reasons that the lower court has not considered the statements of Rajjaq and Gopi Ram, who have stated that the disputed land which has been sold by Municipality to defendant was a part of land of Bhurj itself and this admission of the witness proves that the Municipality has sold the land to defendant which was part of Bhurj. I myself examined the statements of Rajjaq and Gopi Ram and I find that the learned first appellate court misread the statement of Rajjaq and Gopi Ram. In fact, they

have not stated that the disputed land is a part of the land of Bhurj. They have stated that the land, which has been given to defendant by Municipal Board is a part of Bhurj, but they have not stated that the disputed land is a part of Bhurj and the same has been given to defendant. The word “disputed”, in the statement of these witnesses, has been added by the first appellate court itself and the same is not the part of the statements of the witnesses Rajjaq and Gopi Ram. The first appellate court has also referred that in the record of Jagir Commissioner there is no reference of gift-deed (Exhibit-2) executed in the year 1922 in favour of the plaintiffs but he ignored to read the relevant evidence whereby it was clear that office of Jagir Commissioner had record only for the period i.e. 20 years ago from 1954 meaning thereby the record for the period from 1934 to 1954 was available with the office of Jagir Commissioner whereas the record of the year 1922 was not available in the office of Jagir Commissioner. The first appellate court recorded his finding that from the record of the Jagir Commissioner it is not proved that Exhibit-2, the gift-deed, which was issued in the year 1922, was rightly issued.

From the above discussion it is clear that the

findings of the first appellate court are absolutely based on surmises and conjectures and the same are contrary to the record also. From the contents of Exhibit-2 it is clear that the disputed piece of land was given to plaintiff's father Peer Shahabuddin by the then Jagirdar on 14.3.1922 and the plaintiffs were successors of Peer Shahabuddin. The Municipal Board had no authority to issue a 'patta' of an occupied land, which was in occupation of the plaintiffs in the present case. From the evidence on the record it appears that the land which was part of Bhurj was given to defendant through 'patta issued in the year 1970, but the map attached with the 'patta' (Exhibit A-1) was wrongly drawn and the land belonging to plaintiffs was wrongly shown having sold to defendant. It appears from Exhibit-15 and Exhibit A-1 that the defendants made interpolation in the document Exhibit A-1. The lower court considered this aspect of the matter but the first appellate court ignored the same and wrongly decided issue no.1 in favour of the defendants. It is further clear from the evidence on the record and the evidence in respect of custom for taking a person in adoption that learned first appellate court has committed a serious illegality in deciding issue no.2 against the plaintiffs.

The first appellate court wrongly decided issue no.3 against the plaintiffs by observing that there is no plea on behalf of the plaintiff about the adverse possession in the plaint. From the above finding in respect of issue no.1 it is clear that the disputed land was of the ownership of the plaintiffs in pursuance of the gift-deed issued in the year 1922 in their favour, therefore, there was no question of any adverse possession over the disputed land by the plaintiffs, but, in fact, the plaintiffs were the actual owner and in possession of the same. The first appellate court also committed serious illegality in deciding other issues. The defendant forcibly took the disputed piece of land in possession and thereafter the plaintiffs amended their suit. Initially the plaintiff filed the suit for perpetual injunction but when the defendants forcibly took possession of the disputed piece of land then they amended the suit and prayer of possession was also inserted. The lower court rightly decreed the suit of the plaintiffs for perpetual injunction as well as for possession. The defendants were rightly restrained from opening new way and further that the plaintiffs will be entitled to get possession of the disputed piece of land measuring 16' x 12' wide, which is an illegal

possession of the defendants.

In view of the foregoing reasons, it is clear that the lower appellate court wrongly considered the disputed land as part of Bhurj. The finding of lower appellate court is totally based on misreading of evidence and its finding is absolutely perverse, contrary to evidence on record, therefore, the same is vitiated and can not be allowed to be sustained and consequently the finding of the lower appellate court is liable to be set aside. All the questions formulated by this court while admitting the second appeal are liable to be decided in favour of the plaintiffs-appellant and against the defendants-respondents.

Consequently, the second appeal is allowed. The impugned judgment and decree passed by the first appellate court is set aside and the judgment and decree passed by the lower court is restored. There will be no order as to costs.

(Narendra Kumar Jain) J.

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